POWER OF ATTORNEY, GUARDIANSHIP, TRUSTEESHIP AND THE ELDERLY

SENIOR CITIZENS SECRETARIAT

POWER OF ATTORNEY, GUARDIANSHIP, TRUSTEESHIP AND THE ELDERLY

When elderly individuals are physically or mentally unable to make or act on decisions regarding personal or financial matters, the law provides for others to act on their behalf; Power of Attorney, Guardianship, and Trusteeship, provide the legal "status to act."

The adult person's circumstances dictate which one is most appropriate of Power of Attorney, Guardianship, or Trusteeship. Generally, Power-Of Attorney is appropriate when the individual is mentally capable to act for him or herself, but is not able to do so for physical reasons; for example, someone hospitalized for a physical ailment but who is alert and aware, yet cannot get out to the bank or other institutions to take care of his or her affairs, would use a Power Of Attorney to grant someone else the power to carry out these activities as per instructions.

Under the Dependent Adults Act, individuals who are unable to care for themselves and are continuously unable to make personal or financial decisions, may have a guardian or trustee appointed by the court to look after their best interests. A guardian has legal authority to make decisions on behalf of a dependent adult in the area of personal care, and a trustee has the legal authority to make decisions relating to financial matters. One individual may be a guardian, a trustee, or both for the same dependent adult. Guardianships and trusteeships require separate applications (the two applications could be processed together so that only one hearing or court appearance would be required.)

The Dependent Adults Act was created to provide a substitute decision maker, where needed, for those Albertans 18 years of age or older who are unable to care for themselves and repeatedly or continuously are unable to make personal decisions.

Power of Attorney

Power Of Attorney is the most common and also the easiest to obtain legal "status to act." Power Of Attorney, unlike guardianship and trusteeship appointments, is not ordered by the court. The important distinction of Power Of Attorney is that the person giving the power is of "Sound Mind," which means that s/he is alert and able to make decisions. An individual appoints someone to act as his or her agent who will take on the duties set out in the Power Of Attorney document. The document gives the agent the right to make decisions and is also proof that the agent has the right to act on behalf of the individual granting him or her power. Power Of Attorney forms are available at stationery stores.

Often Power Of Attorney is used inappropriately. This occurs because it is easily obtained without the services of a lawyer and individuals may not be aware of the requirements for correct use of Power Of Attorney (for example, individuals with cognitive impairment such as Alzheimer's Disease are unable to give Power Of Attorney because they are not aware of the consequences, even if they can sign their own name.) If an individual acts on behalf of someone who gave a Power Of Attorney when the donor was not of "sound mind," that agent may be held liable for his or her acts by others (i.e. family members) who have an interest in the person who supposedly "granted" Power Of Attorney.

Many family members of an elderly person think they need a Power Of Attorney when a guardian or trustee appointment is appropriate. The best way to ensure that Power Of Attorney is used correctly is to check with one of the legal resource services listed at the back before proceeding.

Guardianship and Trusteeship

Guardianship and Trusteeship are legal concepts commonly thought of in relationship to younger people. However, there are several types of guardians and trustees. For example, a guardian may be appointed for a minor child (under eighteen) who has no parents, or a trustee may be appointed to administer funds left in a will to a minor child.

With regard to living elderly persons, guardians and trustees are appointed to make decisions on behalf of the elderly person who has shown that s/he is repeatedly or continuously unable to care for him or herself or make decisions. Someone may have a problem with mental functioning, but unless s/he shows that s/he cannot care for him/herself and make decisions, guardianship may not be appropriate.

Applying for guardianship or trusteeship requires one to become involved in a legal process. Since appointments are made by order of the court, guardians and trustees are entrusted with a good deal of responsibility regarding the dependent adult's life; the legal process is necessary to ensure the dependent adult's best interests are looked after as intended by the Dependent Adults Act.

Dependent Adults Act

The Dependent Adults Act was passed in 1976 and proclaimed in 1978 to provide substitute decision makers for those over 18 years of age who cannot make their own personal and/or financial decisions and/or are unable to care for themselves. Dependent adults can be individuals with disabilities such as mental retardation, chronic mental illness, brain damage, or cognitive impairment. All Albertans who are declared through a court procedure to be dependent adults must have a substitute decision-maker appointed. This person can be a friend, relative, or other interested person.

If there is no family member or individual who is willing, able and suitable to make application for a person, the Public Guardian will make the application. The Public Guardian does not automatically become appointed. The Public Guardian is part of Alberta Social Services and the Public Trustee is part of the Alberta Attorney General's Department. The standard employed under the act is that guardians and trustees must be "appointed in the best interest of the dependent adult and be of substantial benefit to the dependent adult."

Guardianship

Applying for Guardianship

Guardianship applications are made through the Surrogate Court. First, the individual who may require guardianship must be declared a dependent adult who is unable to make reasonable judgements in some or all matters relating to personal life decisions and who has been shown to be in need of a guardian. This is established by a report from a physician or psychologist which specifies the reasons why the adult in question should be deemed dependent and in need of a guardian. The Surrogate Court has jurisdiction to hear applications for Guardianship and must be satisfied that the Guardianship Order is in the dependents adult's best interests.

Since the application process is a legal one and may seem complicated, the Office of the Public Guardian provides information and support to those who wish to make an application without the services of a lawyer.

The office also provides self-help kits which include all the forms needed for application and step-by-step instructions detailing the application process. Otherwise, a lawyer will be needed to prepare the documents and make an application for a potential guardian. Those considering the use of a lawyer's services should shop around for the best rate. Lawyers charge by the hour; therefore, the prices they quote are based on the amount of time it takes to complete the service. See the back for a list of legal services in the province.

Any "interested person" may apply for an order appointing him or herself guardian of a proposed dependent adult. To become a guardian, a person must be eighteen years of age or older and consent to act as a guardian. The court will want to know that the guardian will act in the best interest of the dependent adult. A guardian must not be in a position where his or her interests conflict with the dependent adult's interests, must be a suitable person to act as guardian, and must be a resident of Alberta. Often the guardian is someone who is aware of the individual's likes and interests--a close relative or a friend.

Responsibilities of a Guardian

Guardians have the authority to make decisions in one or more of the following areas related to the dependent adult's life: living arrangements, social activities, employment, education, obtaining licenses and permits, health care, daily living routines, and legal matters excluding finances. The guardianship order specifies the areas of the guardian's authority.

A guardian is also responsible for respecting the dependent adult's dignity and interests and for promoting the development of the person's ability to act independently. The guardian should choose the least restrictive alternative when choices are available.

Since the guardian's responsibilities are serious, those considering guardianship should decide if they are able and willing to maintain regular contact with the proposed dependent adult. Other questions to consider are whether or not the individual knows and trusts the proposed guardian and if s/he lives close by. Family members of a proposed guardian and of the dependent adult should also be part of an individual's decision to become a guardian of a dependent adult. "Considering Guardianship of an Adult" is a pamphlet available from the Office of the Public Guardian that further details the responsibilities of a guardian.

The Guardianship Order

The Guardianship order legally sets out on paper the name of the guardian and specifies the areas of the guardian's authority. This document gives the guardian the legal authority to sign for the dependent adult and to do the necessary things to carry out the terms of the order. The guardian is allowed to purchase the necessities of life (food, clothing and shelter) without the consent of a trustee (a trustee, if someone has been appointed, is responsible for the dependent adult's financial affairs) or of the dependent adult. The guardian is reimbursed for these purchases. If the guardian signs a contract on behalf of the dependent adult, the contract is binding even after the guardianship order expires.

The Guardianship Review

Guardianship appointments are not permanent and must be reviewed every six years. The date of review is written in the Guardianship Order. Reviews can be set earlier upon request. The purpose of the review is to ensure that the protection and support of the dependent adult continues as was intended in the original order. It is possible a dependent adult may need to have the areas of the guardian's authority either increased or decreased, depending on the dependent adult's progress.

Since reviews only occur once every six years, the Office of the Public Guardian recommends that guardians keep a diary recording their decisions (what, why, when). This diary can also be used to record the dependent adult's personal preferences, habits and area of guardianship granted. The review takes place in the court in which the original guardianship order was granted.

Discharge of a Guardian

A guardian may be discharged when the dependent adult no longer needs a guardian, if the guardian can no longer continue to act, if the guardian fails to follow the guardianship order, if the guardian acts improperly or in any way harmful to the dependent adult, or if the guardian is no longer suitable or leaves the province.

The Alternate Guardian

Under the Dependent Adults Act, a substitute guardian can be appointed to take over the guardian's duties when that guardian is unavailable (due to illness, vacation, etc.). The alternate guardian should be chosen with the same consideration given to the choice of guardian. The Alternate Guardian must be in possession of a letter from the Guardian indicating the intended period of Alternate Guardianship.

The Public Guardian

The Public Guardian is appointed under the Dependent Adult's Act for those dependent adults who do not have family members or other interested persons who would like to be a guardian.

The Office of the Public Guardian also assists people who wish to apply for guardianship and provides support and advice through community involvement programs for those who are already guardians.

Compulsory Care

Sometimes it is also necessary to grant a compulsory care order for dependent adults. This order can be used to place or to keep a dependent adult in a treatment facility after three years. All compulsory care orders must be reviewed. These facilities include:

Michener Centre, Red Deer
Baker Centre, Calgary
Rosehaven, Camrose
Claresholm Centre, Claresholm
Alberta Hospital, Edmonton
Alberta Hospital, Ponoka

A compulsory care order is usually granted when the dependent adult is a danger to himself or others as established by a physician or psychologist, and when the order is in the best interest of the dependent adult.

A Compulsory Care Certificate

A Compulsory Care Certificate can also be made for up to 72 hours. A physician provides a written order that a dependent adult is a danger to himself or others. After 72 hours the certificate is reviewed, and the matter is dropped or an application for a compulsory care order is made.

Compulsory Care Orders and certificates can only be made for legally declared dependent adults.

Trusteeship

Trusteeship applications are made through the court and are similar to guardianship applications, but trusteeship applies only to authority over the financial affairs of a dependent adult. Eligibility of a proposed trustee, appointment procedure, review, discharge, and provision for an alternate trustee are the same as for a guardian. The difference between guardians and trustees is in the area of their authority.

Responsibility of a Trustee

A Trustee has the authority and responsibility to maintain and preserve a dependent adult's estate by controlling his or her financial affairs. The Trusteeship Order is made by the Surrogate Court that also grants Guardianship Orders. The order specifies the areas over which the trustee has authority. The areas might include: the right to lease, sell or transfer property; deposit and invest money; write cheques; cash bonds; settle debts; settle court actions; carry out contracts and, generally, carry on business on behalf of the dependent adult.

Within six months of being appointed, the Trustee is required to file, in the office of the clerk of the Surrogate Court, and inventory and account of the assets and liabilities of the estate of the dependent adult. The Trustee must file, at least once every 2 years, his accounts with the Clerk of the Court. A Trusteeship Order must be reviewed at least every six years.

Public Trustee

The Public Trustee acts on behalf of the dependent adult when no one else is available, or when the original trustee has died.

Public Trustee and Certificate of Incapacity

Residents of the following institutions may have a certificate of incapacity issued without a court order:

Alberta Hospital, Edmonton
Alberta Hospital, Ponoka
Baker Centre, Calgary
Claresholm Centre, Claresholm
Eric Cormack Centre, Edmonton

Michener Centre, Red Deer
Raymond Centre, Raymond
Rosehaven Camrose

The certificate is issued by two physicians or a physician and a therapist who feel that the adult in question cannot make reasonable decisions about his or her estate. The Public Trustee becomes the trustee in these situations. The certificate is reviewed at least once every two years and may be appealed by the dependent adult, the Public Guardian, the Guardian, or if there is no guardian, the adult's closest living relative in Canada. A normal trusteeship application can also be made by a friend or relative to replace the Public Trustee.

Income Security Trusteeship

In some circumstances, when the pensioner is unable to manage his or her financial affairs, Health and Welfare Canada's Income Security Program will arrange for trusteeship with regard to the federal pensions. The person applying for trusteeship is required to fill out a form and have it witnessed and also to have a doctor fill out a special form detailing the pensioner's condition of health. The Trustee is required to report yearly to Income Security and to give an accounting of how the pensioner's money is being used. For further information about trusteeship of income security pensions, contact your Health and Welfare, Income Security Office.

Summary of the Distinction Between Power of Attorney Guardianship and Trusteeship for Elderly Persons

Power Of Attorney	can only be given by a person who is alert and aware of his or her decision to give power. A Court Order is not needed.
Guardianship and Trusteeship	Guardians and Trustees are appointed by Court Order. Guardians are substitute decision-makers in the area of personal life decisions for dependent adults; trustees are decision-makers in financial matters. An individual must be deemed a dependent adult that is unable to make decisions on behalf of him/herself under the Dependent Adults Act to have a Guardian or Trustee appointed.

SERVICES AND ADDITIONAL INFORMATION

PUBLIC GUARDIAN'S OFFICES

Calgary:
2nd Floor, Executive Place
731-6 Avenue S.W.
T2P 0V1
Telephone: 297-3364

Edmonton:
4th Floor, 108 Street Building
9942-108 Street
T5K 2J5
Telephone: 427-0017

Lethbridge:
501 - Professional Building
740-4th Avenue South
T1J 0N9
Telephone: 381-5648

Red Deer:
2nd Floor, Provincial Building
4920-51 Street
T4N 6K8
Telephone: 340-5165

PUBLIC TRUSTEE

Calgary:
2100 AGT Tower
411-1st Street S.E.
T2G 4Y5
Telephone: 297-6541

PUBLIC TRUSTEE (CONTINUED)

Edmonton:
4th Floor
J.E. Brownlee Building
10365-97 Street
T5J 3Z8
Telephone: 427-2744

STUDENT LEGAL SERVICES

(provides free legal information)

Calgary:
Telephone: 220-6637

Edmonton:
Telephone: 432-2226

LAWYER REFERRAL SERVICE

(provides the names of Lawyers in specific categories or areas)

344-12 Avenue S.W.
Calgary, Alberta
Telephone: 263-5988
Toll-Free anywhere in Alberta:
1-800-332-1110

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